right by virtue of which the mortgagee might have claimed it.

When the plaintiff bought this property at the mortgagee's sale he acquired a new title by reason of the forfeiture of the defendant's equity of redemption and it was then for the first time that the possession of the defendants became adverse to him. In my opinion, therefore, the plea of limitation fails, and there must be judgment for the plaintiff with costs.

Judgment for the plaintiff.

NOORDIN BIN MAT DOM v. YAHAYA BIN MOHAMED JALIT.

[Orig. Civ. Juris. (Thomson, J.) January 17, 1952]

[Ipoh — Civil Suit No. 22 of 1951]

Contract — Administrator de bonis non — Contract for sale of land by — Contract Ordinance, s. 47 — Specific Relief Ordinance, ss. 13 and 14 — Measure of damages.

The defendant in this case who was the administrator of the intestate estate of one Mohamed Jalit deceased entered into a contract to sell land to the plaintiff in 1944 and signed the following document:—

"Whereas I, the undersigned, Mohamed Yahaya bin Jalit agree to sell my rubber estate land the area being 5A. OR. 28P. Mukim Batang Padang Lot No. 1954 in cash which I had received was from the hand of Noordin bin Mat Dom who was the one desirous of purchasing it amounting to two thousand and five hundred dollars ($2,500).

"The agreement being that when the administration is completed then only will I transfer this land to the name of Noordin bin Mat Dom, and furthermore anyone of the beneficiaries cannot make a claim over this said land.

"That is all and I hereunder append my signature in the presence of witnesses.

I the undersigned,
Sd. J. M. Yahaya
(Yahaya bin Mohamed Jalit).

Witness.

1. Sd. ?
2. Sd. ?"

In early 1950 the plaintiff entered on the land to tap rubber trees and then sought specific performance of the contract. A counterclaim was made for profits.

Held, (1) that the agreement of sale was of whole land therein described and not only the defendant's share; (2) that the agreement did not require the defendant to apply to Court for an order permitting him to transfer the land; (3) that the agreement was made by the defendant not as administrator but in his personal capacity.

Held further, that the contract was to be performed within a reasonable time and the defendant was in default but as specific performance was not in the personal capacity of the defendant the plaintiff was entitled to damages against him personally for the loss of his bargain the measure of which was what the land would fetch in the open market.

Held on the counterclaim, that the plaintiff was liable to account to the defendant as administrator for profits.

Cases referred to:—

(1) *Vyramuttu v. State of Pahang* 4 F.M.S.L.R. 277.

(2) *Bain v. Fothergill* L.R. 7 H.L. 158.

(3) *Lim Yew Soon v. Gan Chye Neo* 2 F.M.S.L.R. 5.

(4) *Palaniappa Chettiar v. Letchumanan Chettiar* (1950) M.L.J. 274.

(5) *In re Richardson* (1933) W.N. 90.

CIVIL SUIT.

M. S. Mahendran for the plaintiff.

K. C. Chan for the defendant.

Cur. Adv. Vult.

Thomson, J. : — The defendant in this suit is the administrator *de bonis non* of the estate of one Mohamed Jalit, who died in 1923. Administration of the estate was originally granted to the widow of the deceased who herself died in 1937 without having taken any steps towards distributing it and Letters of Administration *de bonis non* were granted in 1938 to the defendant who is the eldest surviving son of the deceased and is beneficially entitled to either a third or a fifth share in the estate. The assets of the estate, which are apparently no nearer distribution now than they were in 1923 consist of a number of pieces of land one of which is the land held under Mukim Batang Padang, E.N.R. No. 1902 for Lot No. 1954.

In October, 1944, during the Japanese occupation, certain negotiations took place between the plaintiff and the defendant relating to Lot 1954 and in the event the plaintiff paid to defendant the sum of $2,500 in Japanese currency and received in return the document of title to the land and a document in the Malay language executed by the defendant of which the following is a translation by the Court Interpreter:—

Agreement.

"Whereas I, the undersigned, Mohamed Yahaya bin Jalit agree to sell my rubber estate land the area being 5A. OR. 28P. Mukim Batang Padang Lot No. 1954 in cash which I had received was from the hand of Noordin bin Mat Dom who was the one desirous of purchasing it amounting to two thousand and five hundred dollars ($2,500).

"The agreement being that when the administration is completed then only will I transfer this land to the name of Noordin bin Mat Dom, and furthermore anyone of the beneficiaries cannot make a claim over this said land.

"That is all and I hereunder append my signature in the presence of witnesses.

I the undersigned,
Sd. J. M. Yahaya
(Yahaya bin Mohamed Jalit).

Witness.
1. Sd. ?
2. Sd. ?"

The execution of this document is admitted by the defendant who also admits that he did not account to the estate for the money he received but spent it on buying food for himself.

The evidence is by no means clear as to what happened to the land on the execution of what I shall call the 1944 Agreement, but I think that the truth is that it lay to all intents and purposes derelict until the beginning of 1950 when the plaintiff entered on it and commenced to tap the rubber trees which, I understand, he is still doing. On 31st January, 1950, plaintiff's solicitor addressed a letter to the defendant requiring him to apply to the Court for an order permitting him to transfer the land to the plaintiff free from all encumbrances. No reply was received to that letter and the present proceedings were commenced in January, 1951.

These proceedings are against the defendant as administrator of the estate of his deceased father. The Plaint set out the 1944 Agreement and went on to say that (presumably by this agreement, for there has never been any suggestion of any other agreement) the defendant not only agreed to sell the land to plaintiff but also agreed to apply for the necessary order of the Court to transfer the land to the plaintiff and agreed to indemnify the plaintiff against any claims that might be made by the other beneficiaries of the estate. It concluded by asking for a declaration that the plaintiff is entitled to specific performance of the 1944 Agreement, for an order that the defendant execute a valid and registrable transfer of the land in question and for other relief which it is not necessary to set out here in detail.

In his Defence, the defendant admitted the execution by him of the 1944 Agreement but said it was an agreement to sell not the whole of the land but only his own share in it. He went on to say that the distribution of the estate was not yet completed and that until it was completed he was not in a position to transfer his share in the land but that "to avoid litigation" he was prepared to pay the plaintiff $250 being the equivalent calculated in accordance with the Debtor and Creditor Ordinance of the $2,500 paid in 1944. He further made a counterclaim for the amount of profits obtained from the land by the plaintiff after he entered on it in 1950.

In his Reply the plaintiff for the first time alleged that "the defendant has intentionally failed and neglected to take appropriate actions to complete the administration of his father's estate".

At the trial the only issue that was seriously contested was whether the plaintiff was entitled to specific performance or damages and, if it were damages, on what basis they should be assessed. I find myself unable, however, to decide these questions without considering the case as a whole.

Apart from the counterclaim, which I shall consider separately, the whole case turns on the construction of the 1944 Agreement. That is a task of no small difficulty but after prolonged consideration I have come to certain conclusions regarding it which I shall now proceed to state.

In the first place it is an agreement for the sale of the whole of the land comprised in Lot 1954 belonging to the estate and not merely of the share of the defendant in that land which is either a one-third or a one-fifth undivided share. I base that conclusion on the words in the agreement "the area being 5A. OR. 28P.", that being the precise area of the whole of the land as shewn in the document of title. If it was not intended to be made clear that the subject matter of the agreement was the whole of the land and not merely a portion of it, I can see no reason why these words should have been included.

In the second place, the agreement does not in fact contain the term which the plaintiff tried both in his letter dated 31st January, 1950, and his Plaint to import into it that the defendant would apply to the Court for an order permitting him to transfer the land.

And in the third place, I am satisfied that the agreement was made by the defendant not in his capacity as administrator of the estate of his deceased father but in his personal capacity. I base that conclusion on the provision that transfer was to take place when administration was completed and "then only". If the defendant was contracting in his capacity as administrator that provision would be completely meaningless, if indeed it did not reduce the whole agreement to so much nonsense, for it would mean that he was contracting to do something only when, from a legal point of view, he had ceased to exist.

Having arrived at these results, I have no hesitation in saying that the true effect of the 1944 Agreement was that the defendant in his personal capacity agreed to sell the whole of the land comprised in Lot 1954 to the plaintiff. That, to my mind, is the plain and obvious meaning of the words of the agreement itself. Moreover, though this is not relevant to the strict technical question of construction, there is nothing in

the surrounding circumstance to suggest that it is an unreasonable construction. After all, he was not promising to sell the moon or the Crown Jewels. He was promising to sell a piece of land in which he had already a substantial beneficial interest and the rest of the beneficial interest in which was held by parties with whom he was in a position to negotiate. If he was able to buy out the other beneficiaries at a low price he had made a good bargain. If they insisted on a high price then he had made a bad bargain. If, however, they refused to sell at any price then he would have failed to fulfil his side of the bargain and like any other unfortunate speculator would have had to take the consequences the nature of which I do not have to consider in the present proceedings.

That brings me to the question of the time when the defendant was required to perform his obligation. Having formed the opinion, which I have already stated, that the only meaning that can be attributed to the provision that transfer was to take place when administration was completed without making nonsense of the whole agreement is that it was intended to make it clear that the defendant was contracting in his personal and not in a representative capacity it follows that the provision has no bearing on the time of performance. The agreement being thus silent as to the time of performance, the position falls to be governed by section 47 of the Contracts Ordinance which reads as follows :—

"47. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

"**Explanation.** — The question "what is a reasonable time" is, in each particular case a question of fact."

Having considered the evidence to which I have listened and having perused the Court file relating to the administration of the estate and not overlooking the delay on the part of the plaintiff in requiring performance and the misleading terms of his letter dated 31st January, 1950, in which he did require it, I have no hesitation in finding as a fact that a reasonable time had elapsed and that the defendant was accordingly in breach prior to the commencement of the present proceedings on 18th January, 1951.

There acordingly now falls to be considered the remedy to which the plaintiff is entitled. He clearly cannot have an order for specific performance in respect of the whole of the land for an order to that effect would be one with which it would be impossible for the defendant in his personal capacity to comply. As regards partial performance, the defendant's beneficial interest in the land is not more than a one-third undivided share at the outside. It follows therefore that the plaintiff is not entitled to partial performance and compensation in terms of section 13 of the Specific Relief Ordinance for it cannot be said that a part of the contract which must be left unperformed bears only a small proportion to the whole in value, and he is not entitled to partial performance alone in terms of section 14 of the same Ordinance for he has not relinquished his claim to further performance and or compensation. In the circumstances, the only remedy which he can have is damages.

With regard to the principle on which damages are to be assessed, the English authorities are not in point. In the case of *Vyramuttu v. State of Pahang*[1] it was held that the English case of *Bain v. Fothergill*[2] has no application in this country, and I think it clearly follows from the decision in the local cases of *Lim Yew Soon v. Gan Chye Neo*[3] and *Palaniappa Chettiar v. Letchumanan Chettiar*[4] that what the plaintiff should recover is damages for the loss of his bargain the measure of which, of course, is what the land would fetch in the open market. I have no evidence before me in the present case on this point. I do not wish, however, to put the parties to the expense of an inquiry and in a similar case a few weeks ago where the land in question was also rubber land in the Malay Reservation but amounted in area to just over 8 acres, I assessed the damages at $2,000. I accordingly assess the damages in the present case at $1,250.

There remains the question of the counterclaim. The initial difficulty presents itself here that although I have decided the plaintiff can recover against the defendant personally, and not in his representative capacity as administrator, it is only in his capacity of administrator that the defendant can succeed, if he is to succeed at all, upon the counterclaim. The difficulty, however, is more apparent than real. After all, he was sued as administrator, and in the case of *In re Richardson*[5] it was held that when a plaintiff sued personally a counterclaim could be raised against him as executor, and by parity of reasoning I see no reason why the converse of that proposition should not apply.

On the merits I can see no defence to the counterclaim. The plaintiff has admitted that he went on the land to tap the rubber and although in all the circumstances of the case I do not consider he should be condemned in damages for trespass beyond a nominal amount which I assess at $1, he must nevertheless account to the defendant as administrator for the profits. There is no real controversy as to the amount of these profits. The plaintiff has produced a statement showing that they amount to $1,601.80.

That figure has not been seriously attacked, and I have no hesitation in accepting it as at the end of April, 1951, beyond which date no claim has been made.

Judgment will accordingly be entered as follows: There will be judgment for the plaintiff against the defendant personally for $1,250 on the claim. There will be judgment against the plaintiff in favour of the defendant as administrator for $1 damages for trespass and $1,601.80 being the profits on the counterclaim. As regards costs the plaintiff will have the costs of the claim and the defendant as administrator the costs of the counterclaim. I make no order as to set off.

Order accordingly.

LIM KIM CHOY v. WONG CHOW.

[Orig. Civ. Juris. (Thomson, J.) January 17, 1952]

[Ipoh — Civil Suit No. 420 of 1951]

Mining Lease — Mining Enactment, s. 26 and Schedule X — Land Code, s. 96 — "Mining Operation" — Meaning of.

The defendant granted a lease in statutory form of mining land to the plaintiff and on the same day a "supplemental agreement" was made whereby provision was made for the renewal at the end of a year of the lease "yearly for a further period of four years" upon certain conditions. Neither documents was registered but the lease was recorded in the Mines Office. At the expiration of the lease the defendant refused renewal alleging a breach of conditions on the part of the plaintiff and want of consideration for the "supplemental agreement."

Held, that the lease and the "supplemental agreement" were to be read together and the consideration for the "supplemental agreement" was the consideration in the lease. Although for want of registration the "supplemental agreement" created no interests in the land nevertheless it conferred contractual rights.

Held further, that on the construction of what amounted to "mining operations" the plaintiff had not committed a breach of the conditions.

Cases referred to:—

(1) *Ramasamy Chetty v. Fan Seng Yew* 1 F.M.S.L.R. 354.

(2) *Haji Abdul Rahman v. Mahomed Hassan* (1917) A.C. 209.

(3) *Gumm v. Tyrie* (1864) 4 B. & S. 680 at 713.

CIVIL SUIT.

K. C. Chan for the plaintiff.

J. R. Devadas for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Thomson, J.: — This action arises out of certain transactions relating to Mining Lease 12560 in respect of Lot No. 34009, Mukim of Ulu Kinta, the holder of which at all material times was the defendant. For some time prior to 21st November, 1949, the lease was subleased to a partnership known as the Hup Lee Kongsi. Their sub-lease, however, came to an end on 21st November, 1949, the defendant granted a fresh sub-lease for a period of one year to the plaintiff. That sub-lease was in the statutory form as set out in Schedule X to the Mining Enactment and being for a period not exceeding one year did not require registration although it was recorded at the Mines Office in due course as Ipoh West Haptong No. 61 of 49. The consideration was expressed to be the sum of $1 and the obligation to pay tribute, and tribute was fixed at the rate of 10 per cent.

On the same day the parties executed an agreement "intended to be supplemental" to the sub-lease. It stated that the parties had "agreed to renew the said sub-lease on its expiry yearly for a further period of four years" upon certain conditions and then set out the substance of the agreement, the relevant portions of which are as follows:—

"1. The Sublessor agrees to renew the said Sublease on its expiry yearly for a further period of four years, on the same terms and conditions; provided always that the Sublessee has carried out the stipulations in the said Sublease to the satisfaction of the Sublessor.

2. If, at any time during the continuance of the said Sublease or any renewal thereof the Sublessee shall cease mining operations on the said land continuously for a period of six months the Sublessor shall have the right to refuse to grant any further renewal thereof.

3. .....

4. The Sublease shall be read and construed and be enforceable as if the terms of this Agreement were incorporated therein.

5. ....."

The question of the validity of this second agreement will have to be considered at a later stage. I would only observe at this stage that it was neither registered nor recorded at the Mines Office.

Yet again, either on 21st November, 1949, or 21st December, 1949 (there is controversy as to the date but the point is not material) a hire purchase agreement was executed under which the lessor hired out to the lessee a quantity of mining equipment including a Diesel engine.

These arrangements being made, the plaintiff entered on the land and commenced mining operations. The nature and the extent of these operations from the major subject of controversy in the case and will shortly call for detailed consideration. It is sufficient to say at this stage that about the middle of December the engine which the plaintiff had hired from the defendant broke down. All attempts to repair it by the sub-lessee apparently failed, and some months later